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NO.

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MALCOLM JOE DAVIS
Appellant

V.

STATE OF MISSISSIPPI
Appellee

ON APPEAL FROM THE SUPREME
COURT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

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March 13, 1982

81 6382

SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 52,659

MALCOLM JOE DAVIS
Appellant

V.

STATE OF MISSISSIPPI
Appellee

NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES

Notice is hereby given that Malcolm Joe Davis, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order affirming the judgment of conviction entered herein on December 16, 1981.

This appeal is taken pursuant to 28 USC §1257(2).

Dated: March 13, 1982

MALCOLM JOE DAVIS - Appellant

BY:
Of Counsel

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iii

NO.

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MALCOLM JOE DAVIS
Appellant

V.

STATE OF MISSISSIPPI
Appellee

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Appellant, Malcolm Joe Davis, moves the court for an order permitting him to proceed in this Court, in forma pauperis, with his appeal from the judgment of the

Supreme Court of the State of Mississippi, entered in this cause on December 16, 1981, pursuant to the provisions of 28 USC §1915, and Rule 46 of the Rules of this Court, and in support thereof attaches the affidavit of the appellant.

Appellant's statement as to jurisdiction is being filed with this motion and appellant's affidavit.

Dated: March 13, 1982

MALCOLM JOE DAVIS - Appellant

BY: _____
Of Counsel

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v

NO.

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MALCOLM JOE DAVIS
Appellant

V.

STATE OF MISSISSIPPI
Appellee

AFFIDAVIT IN SUPPORT OF MOTION FOR
LEAVE TO PROCEED ON APPEAL IN
FORMA PAUPERIS

I, Malcolm Joe Davis being first duly sworn, depose and say I am the appellant, in the above entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor. That I believe I am entitled to redress.

I am presently confined in the Mississippi Penitentiary, pursuant to a sentence imposed after

conviction of rape in the Circuit Court of Pearl River County, Mississippi.

I was granted the right, by order of the state court judge, to proceed with my appeal to the Mississippi Supreme Court in forma pauperis.

My conviction was affirmed by the Mississippi Supreme Court. I seek to obtain a review on the merits by appeal to determine whether the criminal conviction should be reversed.

I further swear that the responses set forth below relating to my ability to pay the cost of prosecuting the appeal are true.

1. I am not presently gainfully employed.

2. I have not received, since March 8, 1979, any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source.

3. I do not own any cash, savings or checking account.

4. I am the father of three young children. However, because of my incarceration in prison, I am unable to provide any support for them.

I understand that false statements in this affidavit will subject me to penalties for perjury.

This affidavit is made in good faith.

A more detailed statement setting forth the grounds on which I believe I am entitled to a reversal of the conviction will be set forth in the "Jurisdictional Statement" to be filed on my behalf.

Malcolm Joe Davis
MALCOLM JOE DAVIS

SWORN TO AND SUBSCRIBED BEFORE ME, this the 4 day of March, 1982.

Jeff L. Porter
NOTARY PUBLIC

My Commission Expires:

My Commission Expires Jan. 23, 1985.

QUESTIONS PRESENTED FOR REVIEW

1. Is § 99-17-1 (1976) of the Mississippi Code Annotated (MCA) repugnant to the speedy trial provision of Amendment VI to the Constitution of the United States under the ruling of the Mississippi Supreme Court that the statute precludes the counting of 252 days of delay between arrest and arraignment despite the precedents of this court which require that all pretrial time (399 days) be counted because of the particular protection and rights of the federal constitutional speedy trial clause?

2. Is the appellant presumed to be denied his interests and rights under the speedy trial provision of Amendment VI when the trial court granted ex parte to the state a non-intrinsic delay of 147 additional days between arraignment and the trial because the district attorney elected to be with the grand jury and try no cases during the entire November 1979 term, and the state purposely failed and refused to utilize the services of the county attorney or envoke either of two state statutes [MCA §§ 25-31-21, 7-5-53 (1972)] to obtain additional prosecutorial assistants?

3. Were the appellant's rights to due process of law under Amendments V and XIV denied when the state courts admitted into evidence two "confessions" which the facts demonstrated were procured as the result of inducements, psychological coercion, and under circumstances contrary to the precedents established by this court?

4. Were the rulings of the Mississippi courts in violation of the appellant's Amendment V rights and contrary to the precedents of this court in Miranda v. Arizona and

Edwards v. Arizona when the two confessions were ruled voluntary and admissible despite the fact that they were obtained by continued questioning after the accused had exercised his rights to remain silent and have his counsel present during the custodial interrogation?

5. Did the Mississippi Supreme Court apply an erroneous standard for determining whether the appellant waived his right to have his counsel present during the 11:60 p.m. - 2:00 a.m. interrogation based solely upon a conclusion of the court that because appellant's counsel failed to appear on the afternoon of March 9, 1979, he waived the presence of counsel and willingly answered the questions of the sheriff?

6. Did the refusal of the trial court to grant a mistrial and the majority of the Mississippi Supreme Court to reverse the conviction because of the comment of the assistant district attorney during the initial summation to the jury "[t]hat all the defendant had to do at the time was to deny he committed the offense," and the explanation of the court that the prosecutor was referring to March 9 and 10, 1979, violate the rights of the appellant and Amendments V and XIV as the dissenting opinion stated?

LIST OF PARTIES IN MISSISSIPPI SUPREME COURT

The appellant, Malcolm Joe Davis, and the appellee, the State of Mississippi, were the only parties in the state trial and appellate court.

TABLE OF CONTENTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES..... i

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS... iii

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS..... v

QUESTIONS PRESENTED FOR REVIEW..... vii

LIST OF PARTIES..... ix

TABLE OF AUTHORITIES..... xii

CONSTITUTIONAL PROVISIONS..... xiv

STATUTES..... xiv

MISCELLANEOUS..... xiv

JURISDICTIONAL STATEMENT..... 1

OPINIONS BELOW..... 1

JURISDICTION..... 2

CONSTITUTIONAL PROVISIONS INVOLVED..... 3

STATUTE INVOLVED..... 4

STATEMENT OF CASE..... 4

Pretrial Proceedings..... 4

Proceedings During The Trial..... 7

Proceedings In The Mississippi Supreme Court. 10

The Mississippi Supreme Court Gave Validity to MCA § 99-17-1 (1976) Which is Repugnant to Speedy Trial Requirements of Amendment VI Because the Statute Precludes Counting 252 Days of Prearraignment Delay..... 10

Amendment V and the Precedents of the United States Supreme Court are contrary to the Decisions of the State Courts that the "Confessions" Were Voluntary and Admissible..... 12

Comments by Prosecutor and Court on the Appellant's Failure to Testify Violated His Amendment V Rights..... 15

Page

HOW THE FEDERAL QUESTIONS WHERE RAISED AND DECIDED IN THE STATE COURTS..... 21

THE FEDERAL QUESTIONS ARE SUBSTANTIAL..... 21

I. Davis' Amendment VI Right To Speedy Trial Was Denied By State Court Validation of MCA § 99-17-1 Which Precluded Counting 252 Day Delay Between Arrest And Arraignment..... 22

II. The Mississippi Supreme Court Declined To Follow the Precedents Established By This Court And Thus Deprived Davis Of His Rights Under Amendments V and XIV; Misapplied "Miranda" and "Edwards" In Upholding the Admission Into Evidence of Two Involuntary "Confessions."..... 32

III. The Majority Of The Mississippi Supreme Court Also Refused To Follow The Precedents Of This Court Relative To The Comments Of The Assistant District Attorney and The Interpretative Explanation Of The Trial Judge To The Jury On Appellant's Failure To Testify And Violated His Rights Under Amendment V..... 41

CONCLUSION..... 43

CERTIFICATE OF SERVICE..... 44

INDEX OF APPENDICES

Appendix	Description	Page
A	Reported opinion entered on December 16, 1981, 406 So.2d 795	1a
B	Unreported opinion entered on September 9, 1981	1b
C	Collected and unreported pages entered December 16, 1981	1c
D	Petition for Rehearing	1d
E	Motion to Dismiss because accused deprived speedy trial	1e
F	Reasons of trial judge for over-ruling motion to dismiss	1f
G	Motion For New Trial	1g
H	Assignment of Errors	1h
I	MCA § 25-31-21 (1972)	1i
J	MCA § 7-5-53 (1972)	1j

TABLE OF AUTHORITIES

Cases — Page

Ascraft v. Tennessee, 322 U.S. 143, 88 L Ed 1192, 64 S Ct 921 — 33

Atchison T. & S. F. T. Co. v. Public Utilities Comm'n (1953) 346 U.S. 346, 348-349 — 2

Barker v. Wingo (1972) 407 U.S. 514, 517, 519-21, 532, 533 — 24, 25, 26, 30, 31

Bitner v. State, 293 So. 2d 339, 341 (Miss. 1974) — 20

Blackburn v. Alabama (1960) 361 U.S. 199 — 33, 35

Brown v. Mississippi (1936) 297 U.S. 278 — 34, 35

Brown v. State, 340 So 2d 718 (Miss. 1976) — 17

Chambers v. Florida 309 U.S. 227, 240 — 32, 33

Cohen v. California (1971) 403 U.S. 15, 17-18 — 2

Coyote v. United States, (CA 10 1967) 380 F. 2d 305, cert. den., 19 L Ed 2d 484 — 36

Davis v. State, 406 So. 2d 795 (Miss. 1981) — 2, 18, 20, 32

Dickey v. Florida (1970) 398 U.S. 30-37-38, 51, 52, 53, 26 L Ed 2d 26, 31, 32, 90 S Ct 1564 — 25, 27, 28, 29

Dillingham v. United States (1977) 423 U.S. 64 — 22

Edwards v. Arizona (May 18, 1981) _____ US _____, 68 L Ed 2d 378, 101 S Ct 1880 — 13

Ferguson v. Boyd, (CA 4 1977) 566 F.2d 873 — 35

Goldblatt v. Town of Hempstead (1962) 369 U.S. 590 — 2

Hadley v. State (Wis 1975) 223 NW2d 461, 78 ALR 3d 273, 284 — 30

Hanrahan v. United States, 121 U.S. App DC 134, 139, 348 F.2d 363 368 (1965) — 28

Hedgepeth v. United States, 124 U.S. App DC 291, 294 and N. 3, 364 F.2d 684, 687, and N. 3 (1966) — 29

Hodges v. United States, 408 F.2d 543, 551 (CA 8 1969) — 25

Klopper v. North Carolina (1976) 386 U.S. 213, 222 — 22, 30

Lambert v. State, 199 Miss. 790, 25 So 2d 477 (1946) — 17

Lathrop v. Donahue (1961) 367 U.S. 820, 824-827 — 2

	Page
Lego v. Twomey (1972) 404 US 477	36
Lisenba v. California, 314 U.S. 219, 86 L Ed 166, 62 S Ct 280	33
Malinski v. New York (1945) 324 U.S. 401, 404	32
Miranda v. Arizona, (1966) 384 U.S. 436, 16 L Ed 2d 694, 86 S Ct 1602	15, 35, 36
Patterson v. State, 357 So. 2d 113, 115-117 (Miss. 1978)	16
People v. Troaut (1960) 54 Cal 2d 576, 80 ALR 2d 1418	35
Pollard v. United States 352 U.S. 354, 1 L Ed 2d 399	28
Prince v. State, 93 Miss., 46 So. 587 (1908)	17
Reck v. Pate (1961) 367 U.S. 433	33
Reddick v. State 72 Miss. 1008, 16 So. 2d 490 (1895)	17, 18
Rogers v. Richmond (1961) 365 U.S. 534	35
Smith v. Hooey (1969) 393 U.S. 607	23
Smith v. United States, 135 U.S. App. D.C. 284, 418 F.2d 1120, 1123, 1124 (1960)	31
State v. Pruitt (NC) 212 SE 2d 92	36
State v. Wallace (Wis) 207 NW 2d 885	36
State v. Watson (NM) 485 P. 2d 197	36
Strunk v. United States (1973) 412 U.S. 339, 340, 434	30
United States v. Lustman, 258 F.2d 475, 477-478 (CA 2 Cir 1958)	29
United States v. Mann, 291 F. Supp. 268, 271 (1968)	30
United States v. Marion (1971) 404 U.S. 307, 313, 316, 317, 92 S Ct 455, 30 L Ed 2d 468, 478	22, 27
United States v. Provoo 17 FRD 183 (DC Md), 350 U.S. 857	28
United States v. Ramsey (1977) 431 U.S. 606	23
United States v. Reed, 285 F. Supp. 738, 741 (DC DC 1968)	28
United States v. Wade (1967) 388 U.S. 218, 227	29
United States v. West, 504 F.2d 253, 256 (DC Cir 1974)	30, 31
Watts v. Indiana (1949) 338 U.S. 49, 54	34
Wilson v. United States (1896) 162 U.S. 626	33

Page

Constitutional Provisions

U.S. Const. amend. V passim
U.S. Const. amend. VI passim
U.S. Const. amend. XIV passim

Statutes

28 U.S.C. §1257(2) i, 2
28 U.S.C. §1915 iv
28 U.S.C. §2103 3
Miss. Code Ann. §7-5-53 (1972) 27, 31
Miss. Code Ann. §9-7-41 (1979) 6, 24, 26
Miss. Code Ann. §13-1-9 (1972) 17, 19
Miss. Code Ann. §25-31-21 (1972) 27, 31
Miss. Code Ann. §99-17-1 (1976) passim

Miscellaneous

American Bar Association Relating to Speedy Trial
Approved draft 1968; pp. 11-13 26
Approved draft 1971; pp. 112-113 26
Approved draft 1972; pp. 48-50 26
29 Am Jur 2d Evidense §550 36
Child, 10 Akron L Rev. 216, 262, 277 35, 36
Fed. Rule Crim. Proc. 48(b) 28
Jellinek, The Declaration of the Rights of Man and of Citizens (1901) p. 98 21
Jones, 29 Baylor L Rev. 1, 3, 4 36, 36-37
Lederer, The Law of Confession - The Voluntariness Doctrine, 74 Mil L Rev. 67, 76, 80-82, 85, 89 35, 36, 37
Dix, Mistake, Ignorance, Expectation, of Benefit, and Modern Law of Confession, 1975 Washington U L Q 275, 296-297 36
Rule 46 - Rules of Supreme Court iv

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MALCOLM JOE DAVIS
Appellant

V.

STATE OF MISSISSIPPI
Appellee

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

JURISDICTIONAL STATEMENT

Appellant, Malcolm Joe Davis, respectfully seeks an appeal to review the final judgment and opinion of the Supreme Court of Mississippi entered on December 16, 1981.

OPINIONS BELOW

The modified opinion of the Mississippi Supreme

Court in Davis v. State, 406 So. 2d 795 (Miss. 1981), on Rehearing December 16, 1981, is reproduced in Appendix A. The unreported opinion of the Mississippi Supreme Court decided September 9, 1981, is reproduced in Appendix B. The corrected and unreported portions only of the September 9, 1981, opinion issued by the Mississippi Supreme Court are reproduced in Appendix C.

JURISDICTION

Jurisdiction of this court is invoked pursuant to 28 USC §1257(2). Cases sustaining the jurisdiction of this court are: Cohen v. California, (1971) 403 U. S. 15, 17-18; Atchison T. & S. F. R. Co. v. Public Utilities Comm'n (1953) 346 U. S. 346, 348-349; Lathrop v. Donohue (1961) 367 U. S. 820, 824-827; Goldblatt v. Town of Hempstead (1962) 369 U. S. 590. This appeal presents he question of the validity of Mississippi Code 1972 Annotated (MCA) §99-17-1 (1976) on the ground that this statute is repugnant to the appellant's rights pursuant to Amendments VI and XIV to the Constitution of the United States.

Appellant was arrested on March 9, 1979, and charged with rape. Trial was not begun until April 10, 1980, 399 days later and resulted in his conviction. Appellant moved, on April 3, 1980, to dismiss the indictment for failure of the court to give him a speedy trial in compliance with Amendment VI. Appellant's motion to dismiss was overruled. The trial court held MCA §99-17-1 (1976) was valid and that the statute was not repugnant to nor violative of Amendment VI.

On appeal, appellant's conviction and sentence were affirmed on September 9, 1981, by the Mississippi Supreme Court (App. B). One judge dissented and filed

an opinion holding that the conviction violated Davis' Amendment V rights. The appellant timely filed a petition for rehearing, reproduced as Appendix D. On December 16, 1981, the Mississippi Supreme Court modified its previous opinion, but denied the rehearing (App. A).

Timely notice of appeal to this court was filed in the Supreme Court of Mississippi on March ___, 1982. Since the Supreme Court of Mississippi expressly rejected appellant's challenge to MCA §99-17-1 (1976); and, otherwise ruled contrary to this court's decisions on the constitutional issues presented in this case, this matter is properly brought to this court by appeal.

In the event that the court does not consider the appeal the proper mode of review, appellant requests that the papers whereupon this appeal is taken be regarded and acted upon by writ of certiorari pursuant to 28 USC §2103.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Amendment XIV, Section 1 to the United States Constitution provides:

> "[N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any

> person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment V to the United States Constitution provides:

> "[N]o person. . .shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

STATUTE INVOLVED

MCA §99-17-1 (1976) provides:

"[I]ndictments to be tried within 270 days of arraignment.

> "Unless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after accused has been arraigned."

STATEMENT OF THE CASE

Appellant, Malcolm Joe Davis, was taken into custody and charged with rape on March 9, 1979 (A. 3a). He was indicted March 16, 1979. Thirteen months later on April 10, 1980, his trial was begun. At 3:00 a.m. on Sunday, April 13, 1980, the jury returned a verdict of guilty. Circuit Judge R. I. Pritchard sentenced the appellant to 30 years imprisonment.

Pretrial Proceedings

When the appellant was taken into custody his "Miranda" rights were read to him (A. 3a). He denied any knowledge of the rape and requested the presence of his attorney (R. 652, 653). An officer telephoned his lawyer in Hattiesburg, Mississippi. The attorney said

he would come to Picayune and confer with the accused (R. 655). Davis so informed the officers. Davis said: "I don't want to talk about it." (R. 643). However, the officers continued to question[1/] the appellant without the presence of his attorney.

During the continued interrogation following Davis' expressed desire to deal with the officers only through counsel, one of the interrogators promised the accused:

> "[i]f you talk to us. . .we'll cooperate with you every way we can. . .I told him it would be best. . .It would make it easier on yourself (R. 669, A. 4a)"

At 11:00 p.m. on March 9, 1979, the sheriff and an auxiliary deputy "[a]sked to have him (Davis) gotten out of the cell where we could talk with him" (R. 782). Appellant was again informed of his "Miranda" rights. He told the sheriff that his attorney was coming to confer with him. The sheriff wrote out three different confessions, and at the direction of the sheriff, the appellant signed his name to two of them, implicating himself in the alleged crime.

The grand jury indicted appellant on March 16, 1979, and the Pearl River Circuit Court set the case for call on March 26, 1979. Davis and his counsel appeared before the circuit judge. The court did not arraign the accused at that time because of its custom of refusing to arraign unless the case was to be tried during the term so as not to start the running of the 270-day period set up in §99-17-1. Davis' case was never scheduled to be tried during the March 1979 term, which began on March 12 and ended Sunday, April 22, 1979.

[1/] In the initial opinion released September 9, 1981, the Mississippi Supreme Court wrote "[N]o interrogation occured that afternoon. . ." (B. 4a). In the modified opinion the state court said: "[S]ome interrogation was continued that afternoon, but no prejudicial or incriminating statements were obtained from Davis. . ." (A. 3a).

On March 30, 1979, Davis filed the first of two motions to suppress the confessions alleging violation of Amendments V, VI and XIV to the United States Constitution, because the incriminating statements were made without counsel being present, at a time of great mental stress, and prior to his appearance before a magistrate.

On April 26, 1979, four days after the March 1979 term had ended, the court entered an order, on the motion of one of appellant's counsel, continuing the case to the November, 1979 term. The order was a nullity. It did not delay the trial.

The pertinent provisions of MCA §9-7-41 (1979) effective Frebruary 22, 1979, provides:

> "[T]he court terms in the Fifteenth Circuit Court district shall be as follows: . . .Pearl River County: On the second Monday of March for . . . (42) days and on the first Monday of November. . .(18) days each for both civil and criminal business. . ."

The 18-day, November, 1979 term of the Pearl River County Circuit Court began on Monday, November 5. The court set Davis' trial for November 16, 1979. The appellant moved for a special venire of jurors on November 7, and filed a list in the office of the clerk of 13 witnesses to be subpoenaed for the trial. On November 13, the district attorney moved ex parte and was granted a continuance to the April 1980 term for the trial of Davis. The non-intrinsic reason given for the delay was the state's lack of prosecutorial manpower, because "[n]o assistant district attorney was provided. . .(and) the District Attorney's presence was required. . .with the Grand Jury. . ."

On November 15, 1979, Davis' counsel appeared and objected, without success, to the delay. At the insistence of counsel, Davis was arrainged on that date.

(F. 2a-6a). On November 30, 1979, Davis' case was preset to begin on April 10, 1980.

On April 3, 1980, the appellant moved to dismiss the indictment and to be discharged because he had been deprived of a speedy trial guaranteed by Amendment VI as a result of the unreasonable delay (399 days) in bringing him to trial. The motion to dismiss is reproduced as Appendix E. On April 7, 1980, the trial judge considered and overruled the motion to dismiss. Set forth in Appendix F are the detailed reasons of the court which in effect justified the delay on the basis of MCA §99-17-1 (1976), which said for good cause two continuances were granted in this case.

Proceedings During
The Trial

During the trial the state offered into evidence the "confessions." The appellant objected on the ground that the incriminating statements were not voluntary because they were the product of duress, fear and compulsion. Davis' will was overbourne by his reaction to the psychological pressures on characteristics personal to him.

The state was under an evidentiary burden to prove "beyond a reasonable doubt" that Davis voluntarily made the incriminating statements and freely confessed to the crime charged in the indictment.

In an attempt to meet this burden the state, over objection, was permitted by a series of leading questions directed to the non-expert law enforcement officer to elicit testimony that the accused appeared to be "sane," "Unintoxicated" and "not drugged" when he was being interrogated.

The accused presented the uncontroverted expert testimony of Dr. Daniel Cox, clinical psychologist:

> "[I] don't think Malcolm Davis knew what he was doing.
> "A. I do not believe Malcolm Davis knew what he was doing when he signed those things. I don't think he was capable of making that decision without counsel. He had no counsel.
>
> "A. At the times Malcolm Davis was alleged to have signed those two documents it's my professional opinion that he would have signed anything simply to relieve the stress that he felt, the anxiety, the nature of his own disturbances. It was like a resolution of the conflict. He would have signed literally anything." (R. 592, 593, 850, 854)

The trial court overruled the objection of the appellant, and admitted the confessions into evidence. When the court admitted documents into evidence, the incriminating statements were given to the jury to read.

The district attorney caused a state witness to display before the jury certain articles and objects implying a connection with the alleged crime. After the prejudicial display the state announced that no attempt would be made to offer the items into evidence. The court overruled the appellant's objection and motion for mistrial. Other than the statement of the prosecutrix the state introduced no evidence to establish the corpus delecti of rape. There was no evidence that the prosecutrix surrendered because of fear arising out of a reasonable apprehension of great bodily harm. There was no evidence that she had had sexual intercourse on March 9, 1979. The excessive and inaccurate comments of the trial judge during the trial was a form of evidence which changed the factual matrix within which a jury customarily operates; structured a verdict of guilty; relieved the state of the burden of establishing "beyond a reasonable doubt" the charge in the indictment; and shifted to the appellant the burden of proving his innocence. The appellant moved to quash the

special venire on the ground that the panel as drawn was violative of his rights under Amendments VI and XIV. Appellant's statistical evidence demonstrated that the jury was not drawn from a representative cross section of Pearl River County. A disportionate number of jurors were drawn from the district wherein the prosecutrix lived.

Statements of the assistant district attorney[2/] and the interpretative remarks of the trial judge[3/] called the attention of the jury to the fact that the appellant had not testified and denied the offense with which he was charged. Counsel for the appellant objected and moved for a mistrial because the comment violated Davis' rights under Amendment V. The objection was overruled and the motion denied.

At the conclusion of the state's case, the appellant moved for dismissal and acquittal because the state had failed to meet its burden of proof. The court denied the motion.

The appellant timely filed his "Motion for New Trial," reproduced as Appendix G. Specifically set forth were charges that the trial court erred: in failing to dismiss and discharge the accused because of the violation of his right to a speedy trial accorded under Amendment VI; in admitting into evidence the "confessions" in violation of the accused' Amendment V rights, because the incriminating statements were not the voluntary acts of Davis, since

---

2/ Closing arguments are not customarily taken by the official court reporter. Appellant's counsel understood the assistant prosecutor to say: "[A]ll Malcolm Davis had to do was to come in here and deny he committed the offense."

3/ The trial judge ruled that the assistant district attorney said "[T]hat all the defendant had to do at that time was to deny he committed the offense." The court explained that the reference was to March 9, 1979.

he was mentally unable to resist the psychological pressures, and because of the promised leniency and reward if he would "talk" to the law enforcement officers; in failing to grant a mistrial because of the comments of the assistant district attorney on the appellant's failure to testify together with the interpretative remarks of the trial judge thereasto which were violative of Davis' Amendment V rights.

On April 21, 1980, the trial court overruled appellant's motion for a new trial. On May 23, the trial court entered its order allowing the appeal in forma pauperis.

Proceedings In the Mississippi Supreme Court

The federal questions in this appeal were presented in the Mississippi Supreme Court. The manner in which the questions were raised and the disposition thereof are set forth herein under the separate sub-headings.

The Mississippi Supreme Court Gave Validity to MCA §99-17-1 (1976) Which is Repugnant to Speedy Trial Requirements of Amendment VI because the Statute Precludes Counting 252 Days of Prearraignment Delay

The Mississippi Supreme Court rendered its original opinion (App. B) on September 9, 1981. The appellant filed a petition for rehearing (App. D) challenging the factual finding and conclusions of law. The state court rendered a modified opinion on December 16, 1981, wherein it charged some of the original findings but nevertheless denied the rehearing (App. A). The opinions of the Mississippi Supreme Court violated Davis' right to a speedy trial when it upheld the validity of MCA §99-17-1 (1976) which is repugnant to his rights under Amendment VI (App. A).

The Mississippi Supreme Court points out in the opinions (App. A, B) that

> "[D]avis contends the trial court failed to grant a speedy trial, violating his Sixth Amendment rights . . .asserts undue delay from the time of the indictment, March 16, 1979, to the time of arraignment, November 15, 1979, and to the time of the trial, April 10, 1980. . .
>
> "[D]avis filed a motion to dismiss the indictment based on the state's failure to bring him to trial within the 270 day time period of MCA §99-17-1 (Supp. 1980). This motion was overruled because the delay was the result of continuances granted.
>
> "[W]e are of the opinion there was not untimely delay between arraignment and trial date. . .
>
> "[t]he time prior to arraignment is not computed to determine compliance with this statute. . . (Emphasis added)
>
> "[t]he delay. . .is not unreasonable in view of the fact the court below has two terms of criminal court each year, March and November terms. Defendant cannot be heard to complain about the first continuance from March 1979 to the November 1979 term because defense requested it to complete psychological tests of defendant. The state requested and was granted the continuance from the November 1979 term to the March 1980 term. . .the continuance, in our opinion, was not unreasonable because the trial court found the District Attorney was required to be before the grand jury the entirety of that term. We. . . think both continuances were necessary and reasonable. . .and surely not violative of MCA §99-17-1 (Supp. 1980) which permits continuances for good cause. . .
>
> "[W]e . . .are of the opinion the delay did not infringe on Davis' constitutional right to a speedy trial.
>
> "[W]e are unable to state there was error in not dismissing the indictment. . .there was some testimony that appellant's incarceration contributed both to his mental and physical deterioration, it was not conclusive on the trial judge as he had other factors to consider in conjuntion with it, such as appellant's physical appearance and demeanor, testimony of deputies and the sheriff as to appellant's mental and physical condition. . .the appellant's right to a speedy trial was not violated" (App. A 4a, 5a, B 4a-6a) (Emphasis supplied)

The decision of the Mississippi Supreme Court (App. A) squarely rejected the appellant's assignment of error reproduced as Appendix H that

> "[T]he failure of the court to grant the defendant a speedy trial violated his constitutional rights under Amendment VI, which is made obligatory on the state by Amendment XIV; aggravated his mental condition because of the prolonged incarceration prior to his trial was unduly oppressive; maximized his anxiety and concern which accompanied the public accusation of the appellant; and greatly impaired his ability to defend himself." (App. H)

The Mississippi Supreme Court ruled that the 252 days from March 9 (date of arrest) to November 15, 1979, (date of arraignment) could not be computed as a part of the 270-day limit under MCA §99-17-1 (1976). The 147 days from November 15, 1979, to April 10, 1980, (the date when the trial began) were the only days the state courts considered under §99-17-1.

Appellant contended and argued in the state courts that each of the 399 days, between the arrest and the commencement of the trial, are required under Amendment VI to be counted as a part of his rights to a speedy trial. To exclude the 252 days is to give validity to MCA §99-17-1 which is repugnant to Amendment VI to the Constitution of the United States.

Amendment V and the Precedents of the United States Supreme Court are Contrary to the Decisions of the State Courts that the "Confessions" Were Voluntary and Admissible

The appellant assigned as error (App. H 2a) the admission into evidence by the trial court of two signed confessions:

> "[T]he procurement, use and admission into evidence of the several involuntary confessions deprived the defendant of the essential elements of due process

> guaranteed by Amendment V; of the right to effective assistance of counsel in violation of Amendment VI. . ."

The Mississippi Supreme Court conceded it found troublesome two aspects of the admission into evidence of the incriminating statements

> "[W]hether they were voluntarily given and whether there was an intelligent waiver of counsel. . . (A 5a)

> "[T]he circumstances of this case parallel rather closely the facts of Edwards[4/] . . .Both cases concern a second police-initiated interrogation. . .Davis reported to the officer that the attorney would come to the sheriff's[5/] office that afternoon and confer with him; however, the attorney did not come to the sheriff's office and confer with Davis that date except in the telephone conversation. Some nine hours later the sheriff and a deputy talked with Davis and obtained the confession. Davis told the sheriff he had spoken to his attorney, but he was still willing to talk to the sheriff at that time. We conclude that after Davis' counsel failed to appear in the afternoon, he willingly waived the presence of counsel and willingly answered questions of the sheriff. . ." (A. 6a) (Emphasis supplied)

The conclusion of the state appellate court has absolutely no basis in fact. Davis never willingly waived the presence of counsel nor did he willingly answer questions. The Mississippi Supreme Court declined to give effect in Davis' case to the legal principles clearly spelled out

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4/ Edwards v. Arizona (May 18, 1981) _____ US _____, 68 L. Ed 2d 378, 101 S. Ct 1880

5/ Davis did not report that the attorney would come to the sheriff's office. Although the statement is minor in importance to the issues involved, the statement does demonstrate the cavalier manner in which the Mississippi Supreme Court treated the detailed facts. Davis reported that the attorney would come to the Criminal Justice Center in Picayune approximately 50 miles southwest of Hattiesburg. The sheriff's office is located in Poplarville, 30 miles southwest of Hattiesburg.

in Edwards to the effect that having exercised his right at 1:55 p.m. to have counsel present during interrogation the appellant did not validly waive that right during the 11:00 p.m. - 2:00 a.m. interrogation.

The misleading factual statements of the Mississippi Supreme Court is again demonstrated:

> "[S]heriff Holliday testified Davis did not make a request to contact his attorney, explaining as follows: 'Whenever I read his rights, and he signed the waiver of rights, he told me that he had spoken to his attorney, but he was still willing to talk to me.'" (A. 4a)

The record presents a different picture. At no time did Davis ever tell the sheriff he was willing to talk to the officer. The sheriff "[j]ust started talking to him about things in general" (R. 525). The statement in the opinion that Davis was willing to talk to the sheriff about things in general does not support the conclusory statement that the appellant was willing to talk to the sheriff about the alleged crime.

The factual differences in the Edwards and Davis cases are so minute as to not to be distinquishable in the application of the legal principles. Davis never voluntarily waived the presence of his counsel at any time; he never abandoned nor relinquished any right or privilege. As in Edwards the Mississippi Supreme Court applied an erroneous standard for determining Davis' right to counsel by focusing on the voluntariness of the two confessions rather on whether he understood his right to counsel and intelligently relinquished that right. Both the trial and appellate courts illegally and arbitrarily ignored the uncontroverted testimony of Dr. Cox that Davis did not know what he was doing when he signed the waiver of rights and the two confessions, because he was incapable of making the decision without counsel and he had no counsel present.

Davis invoked his right to have counsel present at 1:55 p.m. on March 9, 1979, to advise him during the

custodial interrogations. The valid waiver of that right was not and could not be established by the mere "conclusion" of the state appellate court judges that just because the lawyer did not come to the "sheriff's office" on the afternoon of March 9, that Davis waived his right to have counsel present. The mere showing that he responded to the police-initiated interrogation after being again advised of his rights was not sufficient in Edwards nor in Davis to validate the confessions. The use of Davis' "confessions" against him at the trial violated his rights under Amendment V and XIV to have counsel present during every phase of custodial interrogation. Once Davis expressed his desire to deal with the law enforcement officers only through counsel, the sheriff could not legally further interrogate him unless counsel was present as required by Miranda v. Arizona, (1966) 384 U.S. 436, 16 L. Ed 2d 694, 86 S. Ct 1602, unless the appellant himself initiated further communication, exchanges, or conversation with the law enforcement officers, i.e., an actual overture by Davis toward the sheriff. This the appellant did not do.

Davis' rights under Amendments V and XIV were violated in the same manner as were the rights of Edwards.

Comments by Prosecutor and Court on the Appellant's Failure to Testify Violated His Amendment V Rights

The appellant had a consitutional right to remain silent. Permitting the prosecution to use that right as a weapon to convict him violated Davis' rights under Amendment V and made applicable to Mississippi under Amendment XIV. The guarantee against self-incrimination of Amendment V forbids either comment on Davis' failure to testify made by the assistant district attorney, or the clairvoyant perceptive explanation of the remarks

by the trial court of the meaning of the statements which the trial judge made to the jury.

The Mississippi Supreme Court, as far as can be ascertained, refused for the first time in its long history to follow the unbroken line of cases which reverse and remand for remarks made by the state's attorney on the failure of the accused to testify. Patterson v. State, 357 So. 2d 113, 115-117 (Miss. 1978).

In refusing to condemn the comment of the assistant prosecutor, the Mississippi Supreme Court indulged in unjustified assumptions, resorted to the conclusion of justification which the court speculated was in turn evoked by the fact that Davis first denied his participation in the alleged crime and later confessed.

In upholding the trial court's failure to grant Davis a mistrial on the argument of the assistant district attorney, the Mississippi Supreme Court said:

> "[T]he appellant also contends it was reversible error because the trial court refused to grant a mistrial when the assistant prosecutor in the closing argument was allowed to comment on the failure of the defendant to testify in his own behalf. Since defense counsel did not preserve the closing argument for the record[6] or by a bill of exceptions or otherwise, we must assume the court's ruling in this regard is correct. The trial court dictated into the record[7] the following:
>
> 'Let the record show that the Assistant Attorney was arguing the case, and in his argument of speaking of the times that the statements were made by

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6/ There is no provision in Mississippi statutes for closing arguments to be taken and preserved in the record by the court reporter.

7/ The statements of the court were made in the presence of the jury.

> defendant and in reference to those statements, he made the statement that all the defendant had to do at that time was deny he had committed the offense. Upon him stating that, the defense attorneys have now moved the court for a mistrial. The court finds that the statements made by the Assistant District Attorney were made in the 9 March, 1979, and in the early morning of 10 March, 1979, and in conjunction with the statements that were made to the Sheriff and other witnesses at said time and place and were not in any manner referring to any other time, place, circumstance or situation, for this reason, the motion will be overruled.'
>
> "[I]f the attorney's statement could reasonably be construed by the jury as a comment on Davis' failure to testify, then it would be immaterial that the attorney intended to refer to a situation other than the trial-in-chief. Reddick v. State, 72 Miss. 1008, 16 So. 2d 490 (1895).

In the dissenting opinion the state Supreme Court judge said:

> "[M]ississippi Code Annotated §13-1-9 (1972) requires, and this court has held in numerous decisions, that no comment whatsoever shall be made upon the defendant's failure to testify in a case. We have gone further and held no comment can be made which could be construed by the jury as a comment on the failure by the accused to testify. Brown vs. State, 340 So. 2d 718 (Miss. 1976), Lambert v. State, 199 Miss. 790, 25 So. 2d 477 (1946), Reddick v. State, 72 Miss. 1008, 16 So. 490 (1895).
>
> "[A]s this court said in Prince v. State, 93 Miss., 46 So. 587 (1908), the jury cannot avoid being keenly cognizant of the defendant's failure to testify, and the defendant being manifestly the one person most interested in the outcome, the jury can only wonder why he did not testify. To make any kind of comment that can be construed as a statement to the jury as 'Well, if he is not guilty, he could have denied it,' can only result in serious prejudice to the defendant's statutory and constitutional rights under the Fifth Amendment to the Constitution.

"[T]he Court stated in pertinent part:

> '. . .The Assistant Attorney was arguing the case, and in his argument of speaking of the times that the statements were made by the defendant and in reference to those statements, he made the statement that all the defendant had to do at that time was deny that he committed the offense.'
>
> "[F]or twelve jurors under those circumstances to restrict their thoughts solely to the defendant's statements to the law officials, and not also instantly be alerted by this comment the defendant could have denied his guilt as a witness from the witness chair, each would first require a lobotomy. In my view the statement by the assistant prosecutor can only be construed as a comment on the failure of the defendant to testify . . .I think the inference inescapable and unavoidable. (A 9a, B 14-15a) (Emphasis supplied)

The trial court found that the assistant district attroney said in his argument to the jury

> "[t]hat all the defendant had to do at that time was to deny that he committed the offense." (Emphasis supplied)

The majority of the Mississippi Supreme Court said they had difficulty in determining the prejudicial effect of the statement on the jury's verdict (A 7a). The majority "assumed" the trial court properly resolved the question.

Abandoning the historic rule which it announced in Reddick v. State, cited supra, and which it has followed without exception since 1895, the majority of the Mississippi Supreme Court in Davis v. State on the basis of conjecture alone, in the total absence of facts, reached the conclusion that the assistant district attorney was frustrated and perhaps mesmerized by the fact that Davis first denied his participation in the crime and when he was promised leniency, suffered coercion, had his will overbourne, he involuntarily signed two confessions, thereby forfeiting his rights under Amendment V which permitted the prosecutor

to call the jury's attention to the fact that Davis did not testify.

Perhaps most amazing of all, is the statement of the majority of the Mississippi Supreme Court as a justification for denying Davis his constitutional rights:

> "[N]or do we have, as did the trial court, the benefit of defense counsel's argument which might have prompted the comment of the assistant district attorney in reply." (A 7a) (Emphasis supplied)

When the assistant district attorney made the offending comment he was making the prosecutions' opening summation. The defense counsel had not argued to the jury. As far as is known no judicial tribunal in the United States has ever held that the argument of defense counsel would provide the prosecution with license to suspend Amendment V and MCA §13-1-9 (1972) and comment to the jury on Davis' failure to testify.

"Consistency" is not a "jewel" in the Circuit Court of Pearl River County nor in the Supreme Court of Mississippi. For the trial court said the assistant prosecutor argued "[t]hat all the defendant had to do at that time (March 9 and 10, 1979) was deny he commited the offense." On March 9, the law enforcement officers read Davis a statement of the "Miranda" rights in the following language."

> "[Y]ou must understand your rights before we ask you any questions.
> "[Y]ou have the right to remain silent.
> "[A]nything you say can be used against you in court, or other proceedings.
> "[Y]ou have the right to talk to a lawyer for advise before we question you and have him with you during questioning. . . ." (R. 327, 608). (Emphasis supplied).

Davis denied any knowledge of the rape and requested the presence of his attorney, and stated he didn't want to talk.

"Miranda" requires that Davis be told that he has the right to remain silent and no derogatory inference can be drawn from his silence. The Mississippi Supreme Court in Davis v. State told the appellant that if he initially remains silent, the state may take away his rights under Amendment V and call the jury's attention to the fact that he has not testified.

> "[t]o draw a derogatory inference from mere silence is to compel the respondent to testify; and the customary formula of warning should be changed, and the respondent should be told, 'if you say anything, it will be used against you; if you do not say anything that will be used against you.'" Bitner v. State, 293 So. 2d 339, 341 (Miss. 1974).

The Repugnance of §99-17-1 to Amendment VI Was Again Demonstrated When the Mississippi Supreme Court Upheld the Validity of the State Statute Following Appellant's Petition for Rehearing

The question of the validity of MCA §99-17-1 on the ground that the state statute was repugnant to Amendment VI was again presented to the Mississippi Supreme Court on October 8, 1981, in paragraph 10 of the Petition for Rehearing (App. D 4a-5a)

> "[T]he Mississippi Supreme Court erred in the September 9, 1981, decision in
> "(a) refusing to hold the delay of 399 days between Davis' arrest and the beginning of his trial violated his Sixth Amendment right to a speedy trial
> "(b) failing to hold that MCA §99-17-1 under the circumstances existing in this case is unconstitutional on its face and as applied."
> "(c) holding that the failure of Pearl River County to have a prosecuting attorney available at the November, 1979 term in a timely manner justified a continuance "for good cause. . .
> "(d) refusing to hold that the delay of 399 days between arrest and trial gave prima facie merit to Davis' challenge to the lack of a speedy trial
> "(e) refusing to hold from the uncontradicted evidence of the psychological expert that Davis' incarceration contributed to his 'mental and physical con-

> dition' and in accepting the lay testimony of law enforcement officers elicited by leading questions that the appellant appeared 'normal.'" (D 4a-5a) (Emphasis supplied)

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED IN THE STATE COURTS

The appellant properly raised the federal questions presented for review in this court as shown in the "Pretrial Proceedings" (pp. 4-7), "Proceedings During the Trial" (pp. 7-10) and "Proceedings in the Mississippi Supreme Court" (p. 10). Since the appellant set forth in the above named portions of this "Jurisdictional Statement" the method by which the federal questions were raised and the disposition thereof in each instance contrary to the rights of the appellant, it is not deemed appropriate nor necessary to repeat the details in this portion of the appeal.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

Individual citizen Malcolm Joe Davis, by this appeal, seeks to have the United States Supreme Court, as the ultimate umpire, reconcile and adjust the true boundaries between his individual rights with those of the State of Mississippi. The federal constitutional questions presented in this appeal are substantial, in that the issues are of real worth and importance to the appellant and to society as a whole. The making of the reconciliations and adjustments between the individual and the local governments "[i]s the highest problem that thoughtful consideration of human society has to solve."[8/]

8/ Jellinek, The Declaration of the Rights of Man and of Citizens (1901) p. 98.

In this portion of the "Jurisdictional Statement" Davis demonstrates that his rights under Amendments V, VI and XIV were ignored by the state.

I.

Davis' Amendment VI Right To Speedy Trial Was Denied By State Court Validation of MCA §99-17-1 Which Precluded Counting 252 Day Delay Between Arrest And Arraignment.

The Sixth Amendment to the Constitution of the United States guarantees to all persons a "speedy trial" in criminal prosecutions by the federal government. In 1967 this court ruled that an accused's right to a speedy trial protects a fundamental right and is made obligatory upon the states, including Mississipppi, under the due clause of Amendment XIV. Klopper v. North Carolina (1967) 386 U.S. 213, 222.

From the time of his arrest on March 9, 1979, Davis has remained in prison. Amendment VI was applicable to the appellant on the above date for then he became an accused. The computation of time under MCA §99-17-1 does not begin until arraignment. Under Amendment VI the time begins to run when "[t]he putative defendant in some way became an 'accused.'" United States v. Marion (1971), 404 U.S. 307, 313, 316, 317. Justices Douglas, Brennan and Marshall in a concurring opinion indicated the right to a speedy trial applied to pre-indictment stages of the Marion case. "[t]he actual restraints imposed by arrest and the holding to answer a criminal charge. . .engage the particular protection of the speedy trial provision of the Sixth Amendment." Dillingham v. United States (1977), 423 U. S. 64. "[t]he actual restraints imposed by arrest and holding to answer a criminal charge" engage the right and protections of the speedy trial provisions

of Amendment VI. United States v. Ramsey (1977), 431 U.S: 606.

Under Amendment VI the 252-day period between the arrest on March 9, and the arraignment would have counted in the delay. Under MCA §99-17-1 the Mississippi Supreme Court effectively held that Amendment VI and its speedy trial guarantees are displaced by the state statute. MCA §99-17-1 is repugnant to Amendment VI relative to the starting point for counting time.

In Smith v. Hooey (1969), 393 U.S. 607, this court observed with reference to the speedy trial right:

> "[t]his constitutional guaranty has universally been thought essential to protect at least three basic demands of criminal justice in the Anglo-American legal system: '[1] to prevent undue and oppressive incarceration prior to trial, [2] to minimize anxiety and concern accompanying public accusation and [3] to limit the possibilites that long delay will impair the ability of an accused to defend himself.'"

The state court held that the 147 days subsequent to the arraignment and the commencement of the trial was not unreasonable: (1) because the trial court "[h]as two terms of criminal court every year, the March and November terms" (A 4a); (2) because Davis cannot be heard to complain about the continuance from March to November, 1979, for the defense requested it to complete psychological tests of defendant; and (3) because the state requested and was granted a continuance from the November 1979 term to the April 1980 term "[b]ecause the trial court found the District Attorney was required to be before the grand jury the entirety of that term and there was no assistant district attorneys to try the case at this term." (A 4a).

The Mississippi Supreme Court chose to ignore the facts concerning the request of appellant for a continuance to the November 1979 term. As set forth hereinbefore (p. 6) the Mississippi Legislature by an act effective

February 22, 1979, amended MCA §9-7-41 to provide that the March 1979 term of the Pearl River Circuit Court should begin on the second Monday of March (March 12, 1979) and continue for 42 days (April 22, 1979). On April 26, 1979 four days after the term ended the trial court entered an order (R.20) continuing the Davis' case to the November 1979 term. The April 26, 1979 order did not delay the trial of Davis. The state had never set Davis' trial during or for the March 1979 term. The order was a complete mullity as it concerned a continuance. The Davis' case was automatically continued by operation of law when the term ended without a trial. The Mississippi Supreme Court may have confused the order (R. 16) of the trial court dated April 5, 1979, to transfer the defendant to Hinds County for the purpose of having him examined by a psychologist and psychiatrist.[9/]

The Mississippi Supreme Court contends that the 252-day delay from March 9 to November 15, 1979, should be "a continuance duly granted by the court" should be charged against the appellant and constitutes a waiver, pro tanto, of the right to a speedy trial.

Even if the facts demonstrated that Davis asked for a delay to prepare his own case, it cannot constitute a waiver of his right to a speedy trial. It cannot be interpreted as a wilful delay of the trial or be used by the Mississippi Supreme Court as a "good cause" to circumvent Davis' constitutional right to a speedy trial. Barker v. Wingo (1972), 407 U.S. 514, 517.

> "[T]he nature of a speedy trial does make it impossible to pin point a precise time in the process when the

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9/ It is unlikely that the Mississippi Supreme Court confused the order dated August 8, 1979, to have Davis examined by Dr. George Wilkerson, psychiatrist in Hattiesburg.

> right must be asserted or waived, but that fact does not argue for placing the burden of protecting the right solely on defendants. A defendant has no duty to bring himself to trial[26] the State has the duty as well as the duty of insuring that the trial is consistent with due process.[27] Morever, for the reasons earlier expressed, society has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest."

One of the reasons for repudiation of the demand-waiver rule given in Barker v. Wingo was that it placed defense counsl in an awkward position for

> "If counsel is willing to tolerate some delay because he finds it reasonable and helpful in preparing his own case, he may be unable to obtain a speedy trial for his client at the end of that time." (407 U.S. at p. 527).

Barker repudiated the demand-waiver rule in its totality. This court held that a reasonable request by counsel for time to prepare for trial cannot be interpreted as a wilful delay of the trial or be used by the state courts to circumvent Davis' constitutional right to a speedy trial. The 252 days should not have been excluded by the state courts.

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[26] Mr. Chief Justice Burger wrote for the court in Dickey v. Florida:

"Although a great many accused persons seek to put off confrontation as long as possible, the right to a prompt inquiry into criminal charges is fundamental and the duty of charging authority is to provide a prompt trial." 398 U.S. 30-37-38, 26 L. Ed 2d 26, 31, 32, 90 S. Ct. 1564 (1970) footnote omitted.

[27] As a circuit Judge, Mr. Justice Blackmun wrote:

"The government, and for that matter the trial court are not without responsibility for the expeditious trial of criminal cases. The burden for trial promptness is not solely upon the defense. The right to a 'speedy . . .trial' is constitutionally guaranteed and, as such, is not to be honored only for the vigilant and the knowledgeable. Hodges v. United States, 408 F. 2d 543, 551 (CA 8 1969)."

Standardizing the American Bar Association standards Relating to Speedy Trial (approved draft 1968, pp. 11-13) recommends vesting control over the criminal calendar in the trial court and assigning the prosecutor the responsibility of periodically filing reports with the court setting forth the reasons for delay as to each case for which he has not requested trial within a prescribed time following charging. Standards 3.8 relating to the function of the trial judge (approved draft 1972, pp. 48-50) and Standard 5.1 pertaining the function of the prosecutor (approved draft 1971, pp. 112-113) made similar recommendations.

Davis does not fall into that catagory of defendants who consciously seek to delay the trial on the merits. While the legal principles in Barker v. Wingo are controlling in Davis' case, the fact situation in Barker are sharply distinguished. Barker admitted he did not wish to be tried. In a concurring opinion Mr. Justice White stated:

> "[i]t is apparent that had Barker not so clearly acquiesced in the major delays involved in this case the results would have been otherwise. . ." (407 U.S. at p. 537)

The state courts were of the opinion that the 252 days of delay between arrest and arraignment did not

> "[i]nfringe on Davis' constitutional right to a speedy trial" (A 4a) because
>
> "[t]he court below has two terms of criminal court each year, the March and November term. . .10/

10/ Effective April 15, 1981, the Legislature again amended MCA §9-7-41 to read:

"Pearl River County: On the second Monday of March and on the first Monday of November, eighteen (18) days each, for both civil and criminal business; and on the third Monday of June and on the third Monday of September, twelve (12) days, for civil business exclusively, when no grand jury shall be drawn or impanelled unless ordered by the court; and on the first Monday of April, twenty-four (24) days, for both civil and criminal business, when no grand jury shall be drawn or impaneled unless ordered by the court.

> The State requested and was granted the continuance from the November 1979 term to the March 1980 term, . . .however, the continuance in our opinion, was not unreasonable because the trial court found the District Attorney was required to be before the grand jury the entirety of that term and there was no assistant district attorney to try the case at this term. . . ." 11/

The delays in bringing Davis to trial, despite the opinion of the Mississippi Supreme Court, were not sufficient under Amendment VI, to justify the denial of a speedy trial, and the indictment should have been dismissed and the accused discharged. What is a valid delay is explained by Mr. Justice White in the concurring opinion to Barker:

> "[O]nly special circumstances presenting a more pressing public need with respect to the case itself should suffice to justify delay. Only if special considerations are in the case and if they outweigh the inevitable personal prejudice resulting from delay would it be necessary to consider whether there has been or would be prejudice to the defendse at trial. '[T]he major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense.' United States v. Marion [(1971) 409 U.S. 307, 92 S. Ct 455, 30 L. Ed 2d 468] supra, at 320, 30 L. Ed 2d 478." (Emphasis supplied)

In the concurring opinion of Mr. Justice Brennan in Dickey v. Florida (1970) 398 U.S. 30, 52, referred to

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11/ The Mississippi Supreme Court ignored Davis' argument that an assistant district attorney could have been supplied by judicial fiat or an executive order of the governor under MCA §25-31-21 (1972) [Court to appoint an attorney to act for the state in the absence of the district attorney.] MCA §7-5-53 (1972) (Attorney General was directed by the governor to designate an assistant to aid the district attorney.] MCA §25-31-21 (1972) is reproduced as Appendix I. MCA §7-5-53 (1972) is reproduced as Appendix J. L. Jack Stewart was the duly elected and functioning as the county attorney of Pearl River County during the period January 1, 1976 - December 31, 1980. (Official and Statistical Register 1979 - 1980 Mississippi p. 227).

an excusable delay as one of intrinsic importance to the case. Because "[t]he District Attorney was required to be before the grand jury the entirety of that term and there were no assistant district attorneys to try the case. . ." is not intrinsic to Davis' case. As pointed out hereinbefore assistant district attorney could have been provided by judicial fiat or executive order of the governor. Thus the fact that prosecutorial manpower was perceived not to be available for Davis' trial "[m]ust rest with the government rather than the defendant." (407 U.S. at p. 531)

The Mississippi Supreme Court said concerning the delay because "[t]he District Attorney was required to be before the grand jury. . ." was "[n]ot unreasonable." (A 4a) Mr. Justice Brennan in Dickey v. Florida (398 U.S. at pp. 51, 52) asked and answered the issue of the reasonabliness of governmental delay in the following words:

> "[W]hen is governmental delay reasonable? Clearly a deliberate attempt by the government to use delay to harm the accused, or governmental delay that is 'purposeful or oppressive' is unjustifiable. Pollard v. United States (352 U.S.) supra at 361, 1 L. Ed 2d at 399. See also United States v. Provoo [17 FRD 183 (DC Md), aff'd per opinion 350 U.S. 857, 100 L. Ed 761, 76 S. Ct 101 (1955)] supra. The same may be true of any governmental delay that is unnecessary, whether intentional or negligent in origin.[17] A negligent failure by government to insure speedy trial is virtually as damaging to the interests protected by the right as an intentional failure."

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[17] It has been held that negligent delay violates the Speedy Trial Clause, Hanrahan v. United States, 121 U.S. App DC 134, 139, 348 F. 2d 363, 368 (1965); United States v. Reed, 285 F. Supp 738, 741 (DC DC 1968). Cf Fed. Rule Crim. Proc. 48(b) which gives the federal courts discretion to dismiss an indictment if there has been unnecessary delay in prosecution.

Mr. Justice Powell, in Barker said:

> "[T]he approach we accept is a balancing test. . .
>
> "[W]e identify four such factors: Length of delay, the reason for delay, the defendant's assertion of his right, and prejudice to the defendant." (407 U.S. at pp. 530, 531)

The delay of 13 months (399 days) is so excessive that it leads prima facie to the inquiry of whether there was a denial to Davis of a speedy trial. The delay is explainable because of the negligence of the state to have available in a timely manner prosecutorial manpower. Davis asserted his right on November 15, 1979, when he was arraigned.

The delay attributed by the state courts to Davis was not a delay. The March 1979 term had ended when the order was entered. All of the suggested Barker factors are present in Davis' case. After the November 1979 delay, seven of the 13 witnesses for which subpoenaes were requested by the appellant for the November 1979 term were unavailable to testify for the April 10, 1980 trial. However, no burden is placed on Davis to show he was prejudiced. Dickey v. Florida, cited supra, 398 U.S. at pp. 52, 53.

> "[O]ne court has stated 'we think that a showing of prejudice is not required when a criminal defendant is asserting a constitutional right under the Sixth Amendment.' United States v. Lustman, 258 F. 2d 475, 477-478 (CA2 Cir 1958), some have held that prejudice may be assumed after lengthy delays, e.g. Hedgepeth v. United States, 124 U.S. App. DC 291, 294 and N. 3, 364 F. 2d 684, 687, and N. 3 (1966). . .
>
> "[i]t seems that inherent in prosecutorial delay is 'potential substantial prejudice.' United States v. Wade, 388 U.S. 218, 227. . . (1967), to the interests protected by the Speedy Trial Clause. . . 'prejudice may fairly be presumed simply because everyone knows that memories fade, evidence is lost, and the burden of anxiety upon any criminal defendant increases with the passing months and years.'

United States v. Mann, 291 F. Supp 268, 271 (1968)." (Emphasis supplied)

While the speedy trial provisions of Amendment VI is a constitutional protection offered to an accused, the far more important constitutional purpose is the protection of the interests of society. Hadley v. State (Wis 1975) 225 NW 2d 461, 78 ALR 3d 273, 284. Klopper, supra, discusses the reasons for including the right of a speedy trial in the Bill of Rights. The failure to grant a speedy trial is a blot on the system of justice. From the earliest recordation of English constitutional history, it has been recognized as an obligation of the government to see that speedy trials were offered to advance the interests of justice and of society. 386 U.S. 213. In Barker, Mr. Justice Powell, for the court stated:

> "[t]here is a societal interest in providing a speedy trial which exists separate from, and at time in opposition to, the interests of the accused. The inability of the courts to provide a prompt trial was contributed to a large back log of cases in urban courts. . ." (407 U.S. at pp. 519-521)

In Strunk v. United States (1973) 412 U.S. 434, Mr. Chief Justice Burger wrote for a unanimous court that although Barker recognized the severe remedy that was occasioned when the denial of rights to a speedy trial was found:

> "[S]uch severe remedies are not unique in the application of constitutional standards in light of the policies which underlie the right to speedy trial, dismissal must remain, as Barker noted, 'the only possible remedy.'" (412 U.S. at pp. 339-340)

In United States v. West, 504 F. 2d 253, (DC Cir 1974) a unanimous court found a 13-month delay between the arrest and trial of a defendant violated the Sixth Amendment right to a speedy trial. The court per District Judge Soloman said:

> "[A]lthough West was not prejudiced at his trial by the pretrial delay, he was in jail for thirteen months between his arrest and trial.[12/] Extended pretrial detention oppresses the accused and distroys the presumption of innocence. See J. Skelly Wright, J., concurring in part and dissenting in part in Smith v. United States, 135 U.S. App. D.C. 284, 418 F. 2d 1120, 1123, 1124 (1960); Barker v. Wingo, supra 407 U.S. at 532, 533. . ."

The West court recognized that even though the reason for the 13 months delay was calender conjestion and lack of judicial manpower, such institutional delays must still be charged to the government. (504 F. 2d at p. 256, 407 U.S. at 531.) "The public interest in speedy trials can only be protected by imposing sanctions on the government when the criminal justice system is responsible for unjustifiable pretrial delays" (504 F. 2d at p. 256).

The state purposefully and negligently failed to try Davis at the March 1979 term; refused to avail itself of the Mississippi statutes (MCA §§25-31-21 and 7-5-53 (1972) to secure additional assistant district attorneys; failed to utilize the services of the county attorney; and delayed the preset November 1979 trial because of the unavailability of prosecutorial manpower. These were actions for which the state is solely responsible, thus denying the appellant a speedy trial which requires under the governing federal constitutional provision and judicial decisions that the judgment of conviction and sentence be vacated, and the cause remanded to the Mississippi Supreme Court with instructions to dismiss the indictment and discharge Malcolm Joe Davis.

[12/] Davis was also in jail for 13 months between his arrest and trial.

II.

The Mississippi Supreme Court Declined To Follow the Precedents Established By This Court And Thus Deprived Davis Of His Rights Under Amendments V and XIV; Misapplied "Miranda" and "Edwards" In Upholding the Admission Into Evidence of Two Involuntary "Confessions."

The precedents established by this court do not support the decision of the Supreme Court of Mississippi, but require the reversal of Davis v. State. (App. A).

Due process of law under Amendments V and XIV is violated if the state puts into evidence inadmissible confessions. The facts pertaining to the obtaining of the two confessions hereinbefore have been set forth in the "Statement Of The Case" (p. 4), "Pretrial Proceedings" (pp. 4-6) and the admission thereof in "Proceedings During The Trial" (pp. 7, 8, 12-13), and a recitation of those facts will not be repeated in this portion of the "Jurisdictional Statement." Although the Mississippi Supreme Court said "[t]he circumstances of this case parallel rather closely the facts of Edwards. . ." it ruled that Davis' assignment of error on this issue was not meritorious (A. 6a).

The question whether there has been a violation of the due process clause by the introduction of the two inadmissible confessions in Davis' case is one on which this court has traditionally made its own independent determination on the facts. The Supreme Court of the United States is not bound by the factual determination made by the jury; the rulings of the trial court; nor the decision of the Mississippi Supreme Court. Malinski v. New York (1945) 324 U.S. 401, 404. This court said:

> "[B]ut the question whether there has been a violation of the due process clause of the Fourteenth Amendment by introduction of an involuntary confession is one on which we must make an independent determination on the undisputed facts. Chambers v. Florida,

309 U.S. 227, 84 L. Ed 716, 60 S Ct 472, Lisenba v. California, 314 U.S. 219, 86 L. Ed 166, 62 S Ct 280; Ascraft v. Tennessee, 322 U.S. 143, 88 L. Ed 1192, 64 S Ct 921." (Emphasis supplied)

Under "due process" the accepted test is the voluntariness of two of the three confessions.[13/] The test of admissibility "[i]s that the confession is made freely, voluntarily, and without compulsion or inducement of any sort. Wilson v. United States (1896) 162 U.S. 626. There is the element of inducement in Davis' confession for he was promised that "if he would talk it would be easier for him and the law enforcement officers would do what they could for him." The uncontroverted testimony of Dr. Cox demonstrates "compulsion." Davis' will was overbourne at the time he signed the confessions and cannot be deemed the product of a rational intellect and a free will, Reck v. Pate (1961) 367 U.S. 433. Involuntary confessions are inadmissible because societal respect for the dignity and integrity of the human being does not permit officers of the state to overcome the individual will by coercion. This court has noted "[t]he strongly felt attitude of our society that important human values are sacrificed when an agency of the government, in the course of securing a conviction, wrings a confession out of the accused against his will." Blackburn v. Alabama, (1960) 361 U.S. 199.

The American judicial system is "accusatorial" as opposed to "inquisitorial." Society carries the burden

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13/ The Davis case has many similarities to Chambers v. Florida, 309 U.S. 227. Davis' first confession given near midnight on March 9, 1979, was rejected by the Sheriff. In Chambers this court said: "[T]he rejection of the first 'confession,' given in the early hours of Sunday morning, because it was found wanting 'demonstrates the relentless tenacity which 'broke' petitioners' will and rendered them helpless to resist their accusers further." (309 U.S. at p. 240).

of proving its charge against Malcolm Joe Davis, not out of his mouth, but by evidence independently secured through skillful investigation or other legitimate means, Watts v. Indiana (1949) 338 U.S. 49, 54. The circumstances of Malcolm Davis being physically detained and incarcerated; the details of the persistent interrogation of the defendant after he told law enforcement officers he did not know anything about the rape, and did not want to talk about the matter; the recounting of the signing of the two confessions betwen 11:00 p.m. and 2:00 a.m. all have been heretofore set forth. The evidence of the personal characteristics of Davis has been expertly examined and evaluated, all of which conclusively established the involuntary signing of the two incriminating statements because of his susceptibility to the inducements used, and the coercive pressures of the stressful situation created by the law enforcement officers in procuring the "confessions." The totality of the facts and circumstances surrounding the confessions overwhelmingly establish that the incriminating statements were involuntary because the will of Malcolm Davis was overbourne. The rulings of the trial court and the use of the confessions in evidence resulted in the conviction of the defendant and deprived him of his constitutional rights guaranteed to him by Amendments V, VI and XIV.

In a series of decisions beginning in 1936, with Brown v. Mississippi, 297 U.S. 278, this court radically changed the law relative to confessions. Limitations on the admissibility of confessions were imposed. The circumstances by which a confession is obtained is a part of the process by which the state procures a conviction, and therefore subject to the requirements of the due process clause of Amendment XIV.

The trial court in the defendant's case improperly admitted the two confessions despite the conclusive evidence

that Davis made the incriminating statements under duress, fear, compulsion, and the promised reward of an easier situation. Davis' constitutional rights were violated because his conviction was based, in part if not wholly, on the two involuntary confessions. The improper admission of the confessions requires the reversal of the conviction, even if it could be said that there is ample other evidence to support the conviction. Rogers v. Richmond, (1961) 365 U.S. 534.

The early cases dealt with physical violence. Virtually all courts now recognize that psychological pressures can produce involuntary confessions. Child, 10 Akron L Rev. 261, 262; Lederer, The Law of Congession - The Voluntariness Doctrine, 74 Mil L Rev. 67, 80-82 (1976). In Blackburn v. Alabama, (1960) 361 U.S. 199, the Supreme Court has said that "the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated codes of persuasion." The uncontroverted testimony of Dr. Cox clearly established that Davis was "the proper subject," in this case. In recognition of this, all courts have come to accept that the coercion prohibited by the Constitution may include any kind of duress or inducement, physical or mental, that deprives a person, such as Davis, of his powers to make a voluntary rational free will judgment to confess. Since Brown v. Mississippi, cited supra, the cases have gradually come to stress psychological inducement in considering the issue of involuntariness. Blackburn v. Alabama, cited supra; Ferguson v. Boyd, (CA 4 1977) 566 F. 2d 873; People v. Troaut, (1960) 54 Cal 2d 576, 80 ALR 2d 1418.

It was thought by many that Miranda v. Arizona, (1966)384 U.S. 436, which required the giving of a specified warning to an accused prior to custodial interrogation would down grade the importance of the voluntary confession. It

is now clear that such has not been the case. Child, 10 Akron L. Rev. 261, 277; Dix, Mistake, Ignorance, Expectation of Benefit, and Modern Law of Confession, 1975 Washington U L Q 275, 296-97; Lederer, 74 Mil L. Rev. 67, 76.

Thus, even in a case where the Miranda warnings were properly given and a waiver properly taken, the ultimate test of admissibility of a confession still remains whether it was voluntarily made, and a confession that was physically or psychologicall coerced is still inadmissible, regardless of compliance with Miranda. Coyote v. United States, (CA 10 1967) 380 F. 2d 305, cert. den. 19 L. Ed 2d 484; State v. Watson (NM) 485 P. 2d 197; State v. Pruitt, (NC) 212 SE 2d 92; Child, 10 Akron L Rev. 261, 277. In the case of Malcolm Davis, the confession was in violation of Miranda and it was also involuntary.

Under the "totality of circumstances" test used in determining whether a confession was voluntarily made, Mississippi courts were required by the decisional law of this court to take into consideration the personal characteristics, attributes and background of Malcolm Davis. Jones, 29 Baylor L Rev. 1, 4; Lederer; 74 Mil L Rev. 67, 85; Steele 1 Nat J Crim Defense 111, 117-18; State v. Wallace (WIS) 207 NW 2d 885. The law required the Mississippi courts to carefully balance Malcolm Davis' personal characteristics with the pressures to which he was subjected when the incriminating statements were secured. The state courts in this case wholly ignored and disregarded the uncontradicted evidence of Davis' capacity to resist the overtures and pressures on March 9 and 10, 1979. Steele 1 Nat J Crim Defense at p. 130; 29 Am Jur 2d Evidence §550.

The burden of proof was on the state to establish beyond a reasonable doubt that the two confessions were voluntary. Lego v. Twomey (1972) 404 U.S. 477; Jones, 29

Baylor L Rev. 1, 3; Lederer 74 Mil L Rev. 67, 89.

In Miranda v. Arizona (1966) 384 U.S. 436, 444, this court spelled out with some specificity the rules to be followed pertaining to the admissiblity of statements obtained from any individual who is subjected to custodial police interrogation in order to assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself. The Mississippi court totally disregarded the rights of Davis under Amendment V, compelled him to incriminate himself in two confessions, and admitted the statements into evidence with the result he was convicted of the crime of rape and sentenced to prison for 30 years. In Miranda this court said:

> "[P]rior to any questioning the person must be warned that he has a right to remain silent, that any statement he does make may be used against him, that he has the right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided, the waiver is made voluntarily, knowingly and intelligently. If however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned. . ." (384 U.S. at pp. 444, 445)
>
> [A]gain we stress that the modern practice of in-custody interrogation is psychological rather than physically oriented. As we have stated before, since Chambers v. Florida, 309 U.S. 227. . .this court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark

> of an unconstitutional inquisition. Blackburn v. Alabama, 361 U.S. 199 . . ." (384 U.S. at p. 448) (Emphasis supplied)

The law enforcement officers violated Davis' Amendment V rights by continuing to question him without his attorney being present.

On May 18, 1981, this court rendered its decision in Edwards v. Arizona, _____ U.S. _____, 68 L. Ed 2d 378, 101 S. Ct 1880. The Mississippi Supreme Court said "[T]he circumstances in this case parallel rather closely the facts of Edwards. . ." (A. 6a).

Edwards, as was Davis, was arrested on a state criminal charge. He was informed of his rights as required by Miranda v. Arizona, 384 U.S. 436, as was Davis. Edwards was questioned by the police on January 19, 1976, until he said he wanted an attorney. Davis was questioned at 1:55 p.m. on March 9, 1979, and also said he wanted a lawyer. In Edwards the questioning ceased. In Davis, it did not cease. The law enforcement officers continued to question Davis and promised that if he would talk to them it would be easier. In Edwards the officer came to the jail, stated they wanted to talk to him, again informed Edwards of his Miranda rights, and obtained his confession "when he said he was willing to talk." In Davis, the sheriff and an auxillary deputy came to the jail at 11:00 p.m., had the appellant brought out of his cell, again informed Davis of his Miranda rights, obtained three confessions, two of which he signed implicating himself in the crime. Davis never expressed his willingness to talk. In Edwards, the trial court ultimately denied petitioner's motion to suppress his confession finding the confession to be voluntary, and he was thereafter convicted. In Davis, the trial court denied two motions to suppress, and he was also thereafter convicted. In Edwards the Arizona Supreme Court held that during the January 20 meeting he waived his right to

remain silent and his right to counsel when he voluntarily gave his statement after again being informed of his rights. In Davis the Mississippi Supreme Court said "[D]avis made an express waiver of his rights while Edwards evidenced opposition to the interrogation." (A. 6a)

This court said in Edwards that the use of his confession against him at his trial violated his right under the Fifth and Fourteenth Amendments to have counsel present during custodial interrogation as declared in Miranda, supra. Having exercised his right on January 19, 1976, to have counsel present during interrogation, Edwards did not validly waive that right on the 20th.

The Mississippi Supreme Court said in Davis: "[W]e conclude that after Davis' counsel failed to appear in the afternoon, he willingly waived the presence of counsel and willingly answered questions of the Sheriff (A. 6a) (Emphasis supplied.)

Miranda and Edwards both require that Davis have counsel present during custodial interrogation. At no time during the interrogation was Davis' counsel present. The failure of the Mississippi courts to hold that the admission of the two confessions was improper violated Davis' rights under Amendments V and XIV of the Constitution of the United States.

After Davis invoked his right to remain silent and to have the assistance of counsel at 1:55 p.m. on March 9, 1979, the state illegally continued to interrogate him in the absence of counsel; and the state did not meet its heavy burden of establishing that the appellant intentionally waived his constitutional rights in signing the two confessions which were introduced into evidence. Further, Davis' confessions could not be said to be voluntary because a law

enforcement officer told the appellant that if he would talk to the law enforcement officers, it would make it lighter on the accused.

Davis did not validly waive the right to have counsel present during the three hours of interrogation which begun at 11:00 p.m. on March 9, 1979.

In Edwards this court said the petitioner did not waive his right to have counsel present because

> "[t]he Arizona Supreme Court applied an erroneous standard for determining waiver where the accused has specifically invoked his right to counsel. It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused.'" Johnson v. Zerbst, 304 U.S. 458, 464, 82 L. Ed 1461, 58 S Ct 1019, 146 ALR 357 (1938). See Faretta v. California, 422 U.S. 806, 835, 45 L. Ed 2d 562, 95 S Ct 2525 (1975); North Carolina v. Butler, 441 U.S. 369, 374-375, 60 L. Ed 2d 286, 99 S Ct 1755 (1979); Brewer v. Williams, 430 U.S. 387, 404 51 L. Ed 2d 424, 97 S Ct 1232 (1977); Fare v. Michael C., 442 U.S. 707, 724-725, 61 L. Ed 2d 197, 99 S Ct 2560 (1979).

A "conclusion" of the Mississippi Supreme Court that Davis waived his rights because counsel did not appear "in the afternoon" is also "[a]n erroneous standard for determining waiver. . ." The state courts never separately focused on whether Davis had knowingly and intelligently relinquished his right to counsel, as required by Edwards, (68 L. Ed 2d at p. 385

> "[T]he waiver of constitutional guarantee is a matter of federal constitutional law. The Supreme Court announced in Johnson v. Zerbst, 304 U.S. 458. . .(1938), a standard that has been repeated and affirmed; the burden is upon the state to demonstrate 'an intentional relinquishment or abandonment of a known right or privilege.' Id. at 464. . .The Supreme Court has consistently required adherence to a 'totality of circumstances' test in assessing

> the effect of constitutional waivers. See North Carolina v. Butler, 441 U.S. 369. . .(1979); Boulden v. Holman, 384 U.S. 478. . .(1969).
>
> "[A]s we recently noted '[i]n considering the voluntariness of a confession this court must take into account a defendant's mental limitations, to determine whether through susceptibility to surrounding pressures or inability to comprehend the circumstances, the confession was not a product of his own free will.' Janek v. Estelle, 623 F. 2d 629, 937 (5th Cir. 1980. . .) A fundamental concern is a mentally deficient accused's vulnerability to suggestion. See Sims v. Georgia, 389 U.S. 404. . .(1967); Calombe v. Connecticut, 367 U.S. 568 . . .(1961)54/ (footnote omitted.) (Henry v. Dees, No. 79-2585 decided Oct. 8, 1981, slip opinion pp. 12046-12052.

III.

The Majority Of The Mississippi Supreme Court Also Refused To Follow The Precedents Of This Court Relative To The Comments Of The Assistant District Attorney and The Interpretative Explanation Of The Trial Judge To The Jury On Appellant's Failure To Testify And Violated His Rights Under Amendment V.

Again the precedents established by this court do not support the decision of the majority of the Mississippi Supreme Court but require the reversal of Davis v. State.

The self-incrimination guaranty of the Fifth Amendment, in its bearing on Mississippi and the other states by reason of the Fourteenth Amendment, forbids either comment by the prosecution on accused's silence and the explanation of the trial judge in the presence of the jury. Griffin v. California (1965) 380 U.S. 609, reh den 381 U.S. 957.

The facts pertaining to the comment, explanation and ruling of the trial court and the decision of the Mississippi Supreme Court have been set forth hereinbefore at pages 15-20 in the subsection "Comments by Prosecutor.

and Court on Appellant's Failure To Testify Violated His Amendment V Rights." The dissenting opinion in this case correctly states the law as it has existed in Mississippi since 1895. The facts and statements set forth hereinbefore will not be repeated.

The statements were comments on the appellant's failure to testify in his own behalf, and necessarily directed the attention of the jury to the fact that Davis had not testified. Smith v. State, 87 Miss 617, 40 So. 230. MCA §13-1-9 (1972) as well as Amendment V forbids comment upon the failure of an accused to testify without regard to the character of the comment.

In Griffin v. California, supra, this court said;

> "[T]he Fifth Amendment, in its direct application to the federal government and its bearing on the states by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt; hence, a state may not validly apply to a state criminal prosecution a state constitutional provision that in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury."

Davis' liberty should not depend on the struggle of the Mississippi Supreme Court to determine whether or not the prosecutor's remarks were "evoked" or prompted by anything. The questions to consider "[i]s what the jury probably through. United States v. Hardman, 447 F. 2d 853, 855. The dissenting Mississippi Supreme Court judge thought that:

> "For twelve jurors under those circumstances to restrict their thoughts solely to the defendant's statements to the law officials, and not also instantly be alerted by this comment tho defendant could have denied his guilt as a witness from the witness chair, each would first require a lobotomy...."

CONCLUSION

For the foregoing reasons, probable jurisdiction of this appeal should be noted.

Respectfully Submitted,

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NO.

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MALCOLM JOE DAVIS

Appellant

V

STATE OF MISSISSIPPI
Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March, 1982, I caused to be delivered personally the original and two copies of the Notice of Appeal To The Supreme Court of the United States; three copies of the Motion for Leave to Proceed In Forma Pauperis; three copies of the Affidavit In Support of Motion For Leave to Proceed on Appeal in Forma Pauperis; three copies of the Jurisdictional Statement in the above entitled case to counsel of record for the Appellee, at the address listed below:

Honorable Bill Allain
Attorney General of Mississippi
Carol Gartin Building
Jackson, Mississippi

Mr. Robert Womack, Clerk
Mississippi Supreme Court
Carol Gartin Building
Jackson, Mississippi

I further certify that all parties required to be served have been served.

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